Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

ERIC B. FROMER CHIROPRACTIC, INC., a California corporation, individually and as the representative of a class of similarly-situated persons, Plaintiff, vs. INOVALON HOLDINGS, INC., INOVALON, INC., Delaware corporations, and INOVALON SME, LLC, a Delaware limited liability company, Defendants.	No. 8:17-cv-03801-GJH

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendants Inovalon Holdings, Inc., Inovalon, Inc., and Inovalon SME, LLC hereby move to dismiss the Complaint. As explained in the attached memorandum, Plaintiff has failed to allege sufficient injury for standing under Article III of the United States Constitution and Plaintiff's conclusory allegations fail to state a claim upon which relief can be granted. For these reasons, the Court should dismiss the Complaint.

Dated: February 19, 2018

Respectfully Submitted,

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I. INTRODUCTION

This is a Telephone Consumer Protection Act ("TCPA") case brought on the barest of facts. In broad, conclusory brush strokes, Plaintiff alleges that Inovalon Holdings, Inc., Inovalon, Inc., and Inovalon SME, LLC (collectively, "Inovalon") violated the TCPA by sending a fax that did not include necessary "opt-out" language. The current Federal Communications Commission ("FCC")[1] Chairman, Ajit Pai, has emphasized that "the TCPA has strayed far from its original purpose" of protecting people from "the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters" and "become the poster child for lawsuit abuse" targeted at "legitimate, domestic businesses." *In re Rules & Regulations Implementing the Tel. Consumer Protection Act*

[1] The FCC is the federal agency charged with enforcing the TCPA.

of 1991, 30 FCC Rcd. 7961, 8072-73, (2015) (Pai, dissenting). Plaintiff, having brought at least four[2] other TCPA cases since 2014 with nearly identical complaints, is developing into the type of professional plaintiff Chairman Pai lamented as corrupting the original purpose of the TCPA. With its scant factual allegations, numerous conclusory assertions, and theories of liability unsupported by the few facts actually pled, Plaintiff's Complaint fails for two independent reasons.

First, Plaintiff lacks Article III standing. The Complaint fails to explain how any harm suffered could be traced to the lack of opt-out language. Notably, it is not a violation of the TCPA to send an unsolicited fax. Rather, it is a TCPA violation to send an unsolicited fax without the opt-out language to a recipient with whom the sender does not have a pre-existing relationship. Accordingly, as numerous courts have held, a plaintiff must demonstrate that any injury it suffered was due to the defendant's violation. To the extent that Plaintiff has alleged any concrete injury – for example, by including a recitation of unspecified lost materials and time – the injury cannot be plausibly traced to the alleged violation, as the injury would still have occurred had the opt-out language been included. Plaintiff also fails to plead specifics about Inovalon's alleged other fax transmissions. Indeed, in an effort to fit the instant case into its typical mold, Plaintiff has omitted the crucial fact that Inovalon was engaged by an insurance company with whom Plaintiff contracts to contact Plaintiff about patient medical records and to undertake a review of those records for quality, risk score accuracy, and other value-based care initiatives. The fax attached to the Complaint was part of that communication. *See* Part IV(B). Put simply, the alleged injury is not the type the TCPA's drafters intended to prevent and Plaintiff is not the type of consumer the

[2] *Eric B. Fromer Chiropratic, Inc. v. Molina Healthcare of California, et al.*, No. 15-cv-6403 (C.D. Cal. Aug. 21, 2015); *Eric B. Fromer Chiropratic, Inc. v. New York Life Ins. and Annuity Corp., et al.*, No. 15-cv-4767 (C.D. Cal. Jun. 24, 2015); *Eric B. Fromer Chiropratic, Inc. v. Spendwell Health, Inc., et al.*, No. 14-cv-8728 (C.D. Cal. Nov. 10, 2014); *Eric B. Fromer Chiropratic, Inc. v. Lordex, Inc., et al.*, No. 14-cv-7771 (C.D. Cal. Oct. 7, 2014).

drafters intended to protect.

Second, Plaintiff's Complaint should be dismissed because it fails to state a claim that is supported by facts. Hopes, suspicions, and conclusory assertions are no substitute for the well-pled factual allegations demanded by the Supreme Court after its decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). After an extensive discussion of legal background, Plaintiff's factual allegations amount to little more than the fact that it received a fax from Inovalon, and that Plaintiff "is informed and believes" that Inovalon sent similar faxes to others. The fax on its face was not an advertisement as it offers only free services, and Inovalon does not offer commercial products to Plaintiff. Plaintiff's threadbare recitals of the elements of a TCPA cause of action are not enough.

For either of these reasons, the Court should dismiss Plaintiff's complaint. In the alternative, the Court should stay this action pending a determination by the FCC on the dispositive issue of whether the type of fax sent in this case constitutes an actionable advertisement under the TCPA.

II. PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that on or about November 14, 2017, it received a fax from Inovalon. Compl., ¶ 12. Plaintiff further alleges, without elaboration or specifics, that Inovalon "profit[s] and benefit[s] from the sale of the products, goods and services advertised" in the facsimiles. *Id.* ¶ 13. According to the Complaint, Inovalon "faxed the same and other unsolicited facsimiles with opt-out language identical or substantially similar to the opt-out language of the fax advertisement attached hereto as Exhibit A[3] to Plaintiff and at least 40 other recipients or sent the same and other

[3] This despite Plaintiff alleging that the fax at issue contained no opt-out language whatsoever. *Id*. ¶ 17

advertisements by fax with the required opt-out language but without first receiving the recipients' express invitation or permission or without having an established business relationship as defined by the TCPA and its regulations." *Id.* ¶ 15. Finally, Plaintiff alleges that the fax "does not display a proper opt-out notice as required by 47 C.F.R. § 64.1200." *Id.* ¶ 17. Plaintiff claims to have lost the materials needed to receive and print the fax, the time needed to review the fax, and "Plaintiff's and other class members' privacy interests in being left alone." *Id.* ¶ 35.

III. LEGAL STANDARDS

A. Dismissal for Lack of Standing Under Rule 12(b)(1)

Fed. R. Civ. P. 12(b)(1) governs challenges to a court's subject matter jurisdiction to hear a particular case. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A federal court does not have the power to hear cases where Article III standing is not satisfied. *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017), *cert. denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307 (2017). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016).

To establish Article III standing, a plaintiff must satisfy three elements: (1) "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation – "there must be a causal connection between the injury and the conduct complained of"; and (3) redressability – "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted); *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). The "injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

"When, as here, a defendant challenges the existence of subject matter jurisdiction in fact, the plaintiff bears the burden of proving the truth of such facts by a preponderance of the evidence." *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009). When ruling on a Rule 12(b)(1) motion to dismiss, a court may consider extrinsic evidence and documents beyond the complaint. *Id.* at 348. "In a class action, [a court must] analyze standing based on the allegations of personal injury made by the named plaintiffs. 'Without a sufficient allegation of harm to the named plaintiff in particular, plaintiffs cannot meet their burden of establishing standing.'" *Beck*, 848 F.3d at 269–70 (citations omitted). In all cases, "a plaintiff cannot automatically satisfy the injury in fact requirement just because 'a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.' One cannot 'allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement.'" *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 344 (4th Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1548).

B. Dismissal for Failure to State a Claim Under Rule 12(b)(6)

"The purpose of Rule 12(b)(6) is to test the sufficiency of the complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999). To that end, to survive a motion to dismiss, Plaintiff must allege facts sufficient "enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*,

556 U.S. at 678. As the Fourth Circuit has explained, after *Twombly* and *Iqbal*, "complaints in civil actions [must] be alleged with greater specificity than previously was required." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted).

IV. ARGUMENT

A. Plaintiff Lacks Article III Standing

Plaintiff has not pled a "concrete and particularized" injury stemming from the fax and, therefore, has failed to plead that it has Article III standing to bring this action.[4] *See* Compl., ¶ 35. Plaintiff's allegations of harm rest on the intangible injury of receiving a fax without the proper opt-out notice. *Id.* ¶ 30. Absent some concrete harm, this is insufficient. And to the extent Plaintiff attempts to allege any concrete injury, there is no causal connection to the alleged statutory violation. Plaintiff's allegations fail to show how its alleged injury – loss of materials and time – would have been prevented had the opt-out notice been included. Without both a concrete injury and a causal connection, Plaintiff lacks Article III standing.

"In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. A court may first look to whether the type of injury alleged is one that "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* Absent a historical basis for injury, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan*, 504 U.S. at 578). This does not encompass any possible injury relating to a statute, but instead permits those injuries that Congress "sought to prevent" with the statute in question. *See Dreher*,

[4] Inovalon believes that Plaintiff's allegations of subject matter jurisdiction are facially insufficient, but Inovalon does not waive any challenge to the veracity of Plaintiff's sparse allegations, particularly those that directly conflict with the public record. *See infra*.

856 F.3d at 345–46 (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). But because Article III standing requires that a Plaintiff have suffered a concrete, discernable injury, mere violation of the statute is not enough. *Spokeo*, 136 S. Ct. at 1549; *Dreher*, 856 F.3d at 346 (finding "a statutory violation divorced from any real world effect" insufficient to confer standing when a plaintiff alleged that a company did not give him correct information, in violation of the Fair Credit Reporting Act, but failed to allege how that violation "made any difference at all in the 'fair[ness] or accura[cy]' of his credit report," or caused any other injury).

A number of courts have found that plaintiffs fail to allege sufficient injury for purposes of standing when they allege only statutory violations of the TCPA. *See, e.g.*, *Zemel v. CSC Holdings LLC*, CV 16-4064-BRM-DEA, 2017 WL 1503995, at *3 (D.N.J. Apr. 26, 2017); *ARcare v. Qiagen N. Am. Holdings, Inc.*, CV 16-7638 PA (ASX), 2017 WL 449173, at *3 (C.D. Cal. Jan. 19, 2017); *Romero v. Dep't Stores Nat'l Bank*, 199 F. Supp. 3d 1256 (S.D. Cal. 2016); *Ewing v. SQM US, Inc.*, 211 F. Supp. 3d 1289 (S.D. Cal. 2016); *Smith v. Aitima Med. Equip., Inc.*, EDCV1600339ABDTBX, 2016 WL 4618780, at *1 (C.D. Cal. July 29, 2016); *Sartin v. EKF Diagnostics, Inc.*, CV 16-1816, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016).[5]

In *ARCare*, a strikingly similar junk fax class action, the plaintiff alleged that, as a result of the faxes it received, which did not include the required opt-out notices as required by the TCPA, it "lost paper, toner, ink, and time that could have otherwise been spent on business activities." *Id.* In granting the defendant's motion to dismiss, the court explained:

The TCPA does not prohibit the sending of any fax; it applies only to unsolicited

[5] A distinct schism has developed on this issue, with some courts finding that a statutory violation is sufficient injury. *See, e.g. Gorss Motels, Inc. v. Sysco Guest Supply, LLC*, 3:16-CV-01911-VLB, 2017 WL 3597880, at *4-*5 (D. Conn. Aug. 21, 2017) (listing cases but ultimately finding plaintiff had alleged sufficient injury for standing). The approach of these courts, however, does not reflect current Supreme Court precedent on injury and, in any event, cannot relieve Plaintiff of its obligation to plead more than conclusory, vague allegations of harm.

> advertisements which do not include an appropriate opt-out notice. Plaintiff does not attempt to show how it was injured by the receipt of faxes with opt-out notices which failed to fully comply with the TCPA, instead alleging harm which would result from the receipt of any fax.

Id. at *4. The court found no injury had occurred because, had the faxes "fully complied with the TCPA, Plaintiff would have lost the same amount of ink, toner, paper and time." *Id*. Without a concrete injury, plaintiffs lacked standing. *Id.*[6]

In the instant case, Plaintiff has not pled any harm directly stemming from the lack of opt-out notice on the fax. Plaintiff's minimal allegations of harm are limited to the lost "paper and toner," the use of the fax machine and telephone lines, loss of time, and invasion of privacy. Compl., ¶ 35. But Plaintiff fails to plead how this alleged harm specifically stems from or traces to the lack of opt-out provision. Had the fax included the required language, Plaintiff's alleged harms would have been the same. *See ARcare*, 2017 WL 449173, at *3–*4. Nor is there any indication in the Complaint that Plaintiff would have availed itself of an opt-out provision had one been provided. *Id.* Plaintiff also has failed to "demonstrate how [one fax] . . . [is] an invasion of [its] privacy," *Zemel*, 2017 WL 1503995, at *5,[7] or how the lack of opt-out provision invaded Plaintiff's privacy when corporations have no right to privacy in the first instance. Restatement (Second) of Torts § 652I (1977) ("A corporation, partnership or unincorporated association has no

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[6] *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) does not diminish the cogent reasoning of *ARCare*. In *Van Patten*, the Ninth Circuit found that the plaintiff had alleged sufficient injury in the form of two text messages because "the telemarketing text messages at issue here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA. Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients." *Id.* at 1043. Plaintiff, as a corporation, and unlike the plaintiff in *Van Patten*, has no right to privacy. Restatement (Second) of Torts § 652I (1977). Thus, neither the reasoning nor the holding of *Van Patten* apply to this case.

[7] Although the court in *Zemel* was considering text messages, the analysis would not change as to the allegations of harm in this case.

personal right of privacy."); *see also Interphase Garment Sols., LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 467 (D. Md. 2008) (citing the Restatement); *Clinton Community Hosp. Corp. v. S. Maryland Med. Ctr.*, 374 F. Supp. 450, 456 (D. Md. 1974) ("It is clear that corporations do not enjoy a right to privacy.").

Moreover, Plaintiff's conclusory allegations that the fax was an advertisement based on "information and belief" are "an 'inadequate substitute for providing detail' that should be squarely within Plaintiff's control." *Career Counseling, Inc. v. Amerifactors Fin. Group, LLC*, 3:16-CV-03013-JMC, 2017 WL 4269458, at *5 (D.S.C. Sept. 26, 2017) (quoting *Mann Bracken, LLP v. Exec. Risk Indem., Inc.*, No. DKC 15-1406, 2015 WL 5721632, at *7 (D. Md. Sept. 28, 2015)); *Mann Bracken, LLP*, No. DKC 15-1406, 2015 WL 5721632, at *7 ("Under the pleading standard the Supreme Court articulated in *Twombly* and *Iqbal*, a complaint's conclusory allegations based solely 'upon information and belief" are 'insufficient to defeat a motion to dismiss.'" (quoting *Harman v. Unisys Corp.*, 356 Fed. App'x 638, 640–41 (4th Cir. 2009)). As discussed further in Part IV(B), the fax in question was not an advertisement, and so it is unsurprising that Plaintiff cannot allege facts sufficient to confer Article III standing under the TCPA.

At base, Plaintiff's alleged harms are not the harm Congress intended to prevent when it passed the TCPA. The TCPA was enacted to protect consumers from unwanted, intrusive telephone calls. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370, 372 (2012) (explaining that the purpose of the TCPA is to remedy "certain practices invasive of privacy" and "intrusive, nuisance [telemarketing] calls") (citations omitted); *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 797 (W.D. Pa. 1997) (citing *Mims*). Plaintiff has failed to allege how one fax, sent to a business fax machine with a well-publicized number, falls within the scope of harms Congress sought to address. *Zemel*, 2017 WL 1503995, at *5.

Finally, although Plaintiff may not yet have attained the level of a "professional plaintiff," given the potential for litigation abuse inherent in TCPA lawsuits, the Court should scrutinize whether Plaintiff presents the type of plaintiff the TCPA is designed to protect. "Other federal courts have held that professional plaintiffs do not have standing to sue under the TCPA" because those plaintiffs do not fall within TCPA's "zone of interest." *Morris v. Unitedhealthcare Ins. Co.*, No. 4:15-CV-00638-ALM-CAN, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (citing *Telephone Science Corp. v. Asset Recovery Solutions, LLC*, No. 15-CV-5182, 2016 WL 4179150 (N.D. Ill. Aug. 8, 2016), and *Stoops*), *adopted by Morris v. Unitedhealthcare Ins. Co.*, 4:15-CV-638, 2016 WL 7104091, at *1 (E.D. Tex. Dec. 6, 2016).

To that end, Plaintiff has alleged only that it is a California corporation. Compl., at ¶ 9. But Plaintiff omits several other important and material facts. For example, Plaintiff's website[8] indicates that is it a chiropractic medical provider. Exh. 1. Notably, Plaintiff lists its fax number next to its telephone number on the homepage of its website and on its contact page. *Id.* Plaintiff is also registered as a provider on Anthem BlueCross BlueShield's provider directory, available for the public to search. Exh. 2.

Plaintiff is not a consumer receiving countless harassing phone calls or faxes at her home. Rather, Plaintiff is a medical provider that provides its fax number to the public and allows an insurance company to list it as accepting new patients. Plaintiff is not the type of consumer that

[8] Because a facial challenge to jurisdiction is treated similarly to a motion to dismiss under Rule 12(b)(6), the Court may take judicial notice of public records. *See Weaver v. AEGON USA, LLC*, 4:14-CV-03436-RBH, 2015 WL 5691836, at *3 (D.S.C. Sept. 28, 2015) (surveying cases), *modified on other grounds*, 4:14-CV-03436-RBH, 2016 WL 1570158 (D.S.C. Apr. 19, 2016); *see also Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (permitting a court reviewing a motion to dismiss to take note of information on a website); *Philips v. Pitt County Mem'l Hosp.*, 572 F.3d 176, 178 n.2 (4th Cir. 2009) (explaining that while the reviewed documents were not in the record, they were freely available online).

the TCPA is designed to protect. It, therefore, falls outside the statute's zone of interest and lacks standing under Article III. *Cf. Sunbelt Rentals, Inc. v. Victor*, 43 F. Supp. 3d 1026, 1034 (N.D. Cal. 2014) ("A plaintiff pursuing an invasion of privacy action must have conducted himself or herself in a manner consistent with an actual expectation of privacy, *i.e.*, he or she must not have engaged in conduct which manifests a voluntary consent to the invasive actions of defendant.").

Because Plaintiff has failed to allege that it has suffered a concrete injury, and because it falls outside Congress's "zone of interest" for the TCPA, Plaintiff lacks standing to bring this action and the Complaint should be dismissed with prejudice.

B. Plaintiff Has Failed to State a Claim

Plaintiff lacks standing under Article III to bring a claim under the TCPA, but this Court should dismiss Plaintiff's Complaint for yet another reason. In filing a Complaint almost entirely devoid of details, Plaintiff has failed to allege sufficient facts to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Aside from conclusory statements, Plaintiff has failed to plead that the fax in question was an advertisement as defined by the TCPA. To compensate for this deficiency, Plaintiff has presented a hazy, nebulous context in which the fax was sent. By contrast, the statutory requirements are clear that the TCPA regulates only unsolicited faxes with a purpose of obtaining a commercial benefit from the recipient. Because Inovalon's fax did not have the ability to obtain any commercial benefit from Plaintiff, Plaintiff has not and cannot plead a claim under the TCPA.

Under the TCPA, "[t]he term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C.A. § 227 (2016). In 2006, the FCC promulgated a rule regarding what constituted advertising under the TCPA: Rules and Regulations Implementing the Telephone Consumer

Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 FR 25967-01 (May 3, 2006) (the "2006 Rule"). The 2006 Rule stated that the FCC would consider faxes that advertised free goods or services to be advertisements under the Act because, "[i]n many instances, 'free' seminars serve as a pretext to advertise commercial products and services. Similarly, 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." *Id.* at 25973. The 2006 Rule underscores that the crux of whether a fax is an advertisement under the TCPA is whether the fax has a commercial purpose.[9] "[T]o be an ad, the fax must promote goods or services to be bought or sold, and it should have profit as an aim." *Sandusky Wellness*, 788 F.3d at 222 (reviewing the definition of "advertising" and "commercial"). A fax from a company "that . . . has no interest whatsoever in soliciting business from" the recipient cannot be concerned with selling services or making a profit. *Id.*; *see also N.B. Indus., Inc. v. Wells Fargo & Co.*, 465 Fed. App'x. 640, 642 (9th Cir. 2012) (holding that for a fax to be an advertisement, it must promote something that is "commercially available").

Sandusky Wellness is instructive. At issue in that case was whether a fax listing medications available through a health plan constituted an advertisement. 788 F.3d at 221-22. In no uncertain terms, the district court held the fax to be purely informational, observing the irony that "[m]edical providers, like the plaintiff here, are often in the forefront of those complaining

[9] There is currently a circuit split as to whether the FCC's explanation is entitled to substantial deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). *See Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 223 (6th Cir. 2015) (listing cases). Although the statutory language is unambiguous, if the Court were to defer to the agency's explanation that "would only bolster [the] conclusion" that for a fax to be an advertisement, its primary purpose must be commercial. *Id.*; *see also Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, CV 3:15-14887, 2016 WL 5799301, at *3 (S.D. W. Va. Sept. 30, 2016) (fax offering a free physicians' desk reference ebook held not to be an advertisement at dismissal stage); *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals, Inc.*, CIV.A. 12-2132 FLW, 2013 WL 486207, at *3 (D.N.J. Feb. 6, 2013).

about frivolous litigation. That description is not far off the mark, if off at all here." *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, No. 3:14CV00583, 2014 WL 6775501, at *2 n.1 (N.D. Ill. Dec. 2, 2014). The Sixth Circuit affirmed and noted that "[t]he fact that the sender might gain an ancillary, remote and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation." *Sandusky Wellness*, 788 F.3d 225. In other words, there must be an actual, commercially available product or service being offered to the recipient in return for direct financial benefit to the sender. *See also Phillips Randolph Enters., LLC v. Adler-Weiner Research Chicago, Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007) (granting motion to dismiss and finding that fax, which invited businesses to participate in a research discussion on topic of new healthcare program in exchange for $200 honorarium was not an advertisement); *Ameriguard, Inc. v. Univ. of Kansas Med. Ctr. Research Inst., Inc.*, No. 06-cv-0369, 2006 WL 1766812 , at *1-*2 (W.D. Mo. June 23, 2006) (dismissing complaint and holding that fax announcing the existence of a clinical drug trial and defendant's need for individuals to participate in trial was not an advertisement).

Plaintiff's claim fails here. What little Plaintiff alleges to assert that the fax in question was an advertisement under the TCPA rests on the idea that "[o]n information and belief, [Inovalon] receive[s] some or all of the revenues from the sale of the products, goods and services advertised on [the fax]." Compl., at ¶ 13. Plaintiff's conclusory, vague allegations do not come close to pleading a plausible cause of action under the TCPA. *See Mann Bracken, LLP*, No. DKC 15-1406, 2015 WL 5721632, at *7. Moreover, even on the face of the fax, this bald assertion is unsupported. The fax clearly states that one of the benefits of Inovalon's service is that it is "[n]o cost to [the] practice." Compl., Exh. A (ECF 1-1), at 2. The fax in question is not "a direct commercial solicitation or a pretext for a commercial solicitation." *ARcare v. IMS Health, Inc.*,

2:16CV00080 JLH, 2016 WL 4967810, at *1 (E.D. Ark. Sept. 15, 2016). There is no hint of Inovalon obtaining a financial benefit from the recipients of the fax, and Plaintiff has pled nothing but conjecture to support its conclusion to the contrary. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, CV 3:15-14887, 2016 WL 5799301, at *3 (S.D. W. Va. Sept. 30, 2016) (holding a fax was not an advertisement because the mere possibility that the defendant received some commercial benefit was not enough to meet *Twombly*'s plausibility standard).

Public information further reveals the extent of Plaintiff's unfounded accusations. As detailed in Inovalon's pending petition to the FCC,[10] Inovalon does not sell the products or services at issue in this case to the recipients of faxes. Rather, Inovalon contracts with health plans, provider systems, and pharmaceutical and device manufacturer adjacencies to collect and analyze patient health data. *In re Inovalon, Inc.'s Pet. for Expedited Declaratory Ruling*, CG Docket No. 02-278 (FCC Feb. 19, 2018). The fax was part of Inovalon's communications with providers in order to obtain medical health records for an insurance company. *Id*. at 3. The providers, through their contract with the insurance companies, consent to the release of the medical information.[11] *Id*. at 3.

Once an insurance company gives Inovalon information about a provider who has

[10] A copy of Inovalon's petition to the FCC seeking an expedited declaratory ruling is attached hereto as Exhibit "3" for the Court's convenience. A pending petition to the FCC is a public document. *See Gusman v. Comcast Corp*., No. 13CV1049, 2014 WL 2115472, at *5 (S.D. Cal. May 21, 2014) ("The Court may take judicial notice of information made 'publicly available by government entities' and whose authenticity no party disputes, such as declaratory ruling petitions filed with the FCC . . . .") (internal citations omitted).

[11] Inovalon uses the information to provide valuable insight to insurance companies regarding numerous issues, including, but not limited to, possible gaps in healthcare access, missing billing codes, incorrect documentation, and proper care for chronic illnesses. The insurance companies compensate Inovalon for this analysis. *Id*. at 4.

contracted with the insurance company, Inovalon calls the provider to verify that the insurance company has given Inovalon correct contact information for the provider's site, including the correct fax number. *Id.* After verifying the site information, Inovalon contacts the provider to retrieve the patient's health records. *Id.* Depending on the specific provider and records to be retrieved, Inovalon informs the providers how the records may be collected. For example, Inovalon can come to the provider's office to create a digital image of the medical record. *Id.* The most efficient way to collect the necessary data from providers is by using electronic health records ("EHR"). *Id.* Through the use of Inovalon's EHR Interoperability solution, Inovalon can collect clinical data from providers through a HIPAA-compliant connectivity gateway process without having to be physically present in their offices. *Id.* This automatic extraction of patient records minimizes disruption to the providers and their patients.

Providers who did not respond to initial requests to provide patient health records received the fax at issue in this case. *Id.* The fax promotes the use of Inovalon's EHR Interoperability solution as a way for providers to comply with the information requests in an efficient, cost-effective manner. *Id.* Inovalon receives no money or sales from the fax or the use of the system. *Id.* at 4. It is merely one way for providers to provide patient information to Inovalon, as required by the providers' contract with the insurance companies that are Inovalon's clients. *Id.* The providers, through their contract with the insurance companies, have consented to having the insurance companies contact them to obtain these records. *Id.* Plaintiff conspicuously omits the entirety of this context.

Because Inovalon does not sell the services described in the fax to providers, this case is distinguishable from cases where a free service was offered as a precursor to a sale or as part of a larger marketing campaign. *Compare Physicians Healthsource, Inc. v. Boehringer Ingelheim*

Pharmaceuticals, Inc., 847 F.3d 92, 95 (2d Cir. 2017) (finding that plaintiff had pled that a fax advertising a free seminar could plausibly have "a commercial nexus to a firm's business" because "[b]usinesses are always eager to promote their wares and usually do not fund presentations for no business purpose"). Inovalon's fax is not a pretext and distinctly states that its service is provided at no cost. The service benefits the providers and helps Inovalon collect the patient data it needs, but the service is not for sale. *See N.B. Indus.*, 465 Fed. App'x. at 642 (holding that a fax announcing an awards ceremony and encouraging applicants was not an advertisement because the award was not "commercially available" even if it provided intangible benefits, like publicity, to the winner). There is no indication that the fax is part of a larger campaign to sell anything to the recipients—nor could there be, since Inovalon's customer is the insurance company, not the provider.

In enacting the TCPA, Congress intended to stem the proliferation of unsolicited fax advertisements. The statute and applicable FCC regulations confine the Act to faxes that have a commercial purpose. Plaintiff should not be permitted to maintain a claim under the TCPA without pleading a sufficient factual basis rendering it plausible that the fax it received was an advertisement. Because the fax had no commercial purpose, Plaintiff cannot so plead. Therefore, the Complaint should be dismissed with prejudice.

C. If the Court does not dismiss the Complaint, the Court should stay the case.

As noted above, Inovalon has filed a petition with the FCC seeking, among other things, confirmation that faxes which present free services from which no commercial benefit can be obtained do not qualify as advertisements under the TCPA. The FCC's response could be dispositive to this case. For this reason, should the Court elect not to dismiss the Complaint, Inovalon respectfully requests that the Court stay this action pending the FCC's resolution of Inovalon's petition.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379 (4th Cir. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)). A stay is especially appropriate when an issue "involves technical questions of fact and policy bound up with an assessment of industry standards or practices." *Stewart v. T-Mobile USA, Inc.*, 4:14-CV-02086-PMD, 2014 WL 12614418, at *3 (D.S.C. Oct. 8, 2014). Under the doctrine of primary jurisdiction, a court may find that such questions are best answered by an administrative agency. "The doctrine of primary jurisdiction 'is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.'" *Id.* at *2 (quoting *Reiter v. Cooper*, 507 U.S. 258, 268 (1993)). "The principal reasons for the doctrine of primary jurisdiction are to obtain the benefit of the expertise and experience of the administrative agencies and the desirable uniformity which occurs when a specialized agency decides certain administrative questions." *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 303 F.3d 316, 322 n.10 (4th Cir. 2002) (quoting *Alltel Tenn., Inc. v. Tenn. Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990)). Courts regularly stay TCPA cases pending FCC determinations of petitions to the agency. *See, e.g., Comprehensive Health Care Sys. Of the Palm Beaches, Inc. v. M3 USA Corp.*, No. 16-cv-80967, 2017 WL 4868185, at *1-*3 (S.D. Fla. Oct. 6, 2017) (staying TCPA junk fax litigation based on FCC petition filed nearly a year after the complaint was filed); *Degnen v. Dental Fix RX*, LLC, No. 4:15-CV-1372, 2016 WL 4158888, at *3 (E.D. Mo. Aug. 5, 2016) (staying junk fax action to allow FCC determination on defendant's petition filed after initiation of lawsuit) (citing cases).

Courts have developed a four-factor test to determine whether to stay a case under the doctrine of primary jurisdiction:

> (1) whether the question at issue is within the conventional experience of judges or it is within the agency's particular field of expertise;
> (2) whether the question at issue is particularly within the agency's discretion;
> (3) whether there exists a substantial danger of inconsistent rulings; and
> (4) whether a prior application to the agency has been made.

Stewart, 2014 WL 12614418, at *3 (citing cases). This case implicates all four factors. Regarding the first and second factors, interpretation of the TCPA is firmly within the FCC's particular field of expertise and within the agency's discretion. *Id.* at *4. As to the third factor, as indicate above, Plaintiff has pursued identical lawsuits in another jurisdiction and nothing prohibits Plaintiff from pursuing additional identical lawsuits nationwide. This increases the potential for inconsistent rulings, while, by comparison, waiting for the FCC to issue an interpretation will further clarify "the law that Plaintiff relies upon and seeks to enforce in the present action, thereby ensuring that the TCPA is applied in a more uniform manner." *Id.* at *4–*5. Finally, the fourth factor also weighs in favor of a stay, as Inovalon already has filed a petition for declaratory ruling with the FCC. *See id.* at *5.

CONCLUSION

For all of the reasons set forth above, this Court should dismiss the Complaint against Inovalon, or, in the alternative, the Court should stay this case pending the FCC's resolution of Inovalon's petition.

Dated: February 19, 2018

Respectfully Submitted,

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October 2014, a copy of the foregoing motion to dismiss and memorandum of law in support thereof were served on all counsel of record via the Court ECF System.

/s/ Daniel S. Blynn

An Attorney for Defendants

EXHIBIT 1

ERIC B. FROMER
CHIROPRACTIC, INC.
Los Angeles Chiropractor

LOS ANGELES, HOLLYWOOD, NORTH HOLLYWOOD, WEST HOLLYWOOD CHIROPRACTIC CLINIC!

Treating the full spectrum of chiropractic care.
Experience physical excellence for the rest of your life!

Dr. Fromer understands how taxing and debilitating chronic pain can be. Whether it is located in your back or radiates throughout your joints, constant pain can make every little chore seem like an insurmountable obstacle. Dr. Fromer strongly believes that back and joint pain shouldn't get in the way and prevent you from enjoying life. If you live in the Los Angeles area, Dr. Fromer is the chiropractor of choice.

MAKE YOUR APPOINTMENT

You can find us here:
5123 West Sunset Blvd. Suite 202
Los Angeles, CA. 90027

CORRECTIVE EXERCISE

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Massage, bodywork and somatic therapies are defined as application of various techniques to the muscular structure and soft tissues of the human body.

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NERVOUS SYSTEM

Specializing in the detection and correction of misalignments in the spine in order to remove stress from the nervous system.

contact us

Patients' Choice WINNER 2015

A Los Angeles winner of the 2015 patient's choice awards in Chiropractic
Verified by Opencare.com

What is chiropractic?

Chiropractic is a branch of the healing arts which is based upon the understanding that good health depends, in part, upon a normally functioning nervous system (especially the spine, and the nerves extending from the spine to all parts of the body). "Chiropractic" comes from the Greek word Chiropraktikos, meaning "effective treatment by hand."

More...

About your first visit

Your chiropractor will start with a discussion about you, your health and your reasons for asking for chiropractic care. The consultation can last a short period of time or up to a half an hour, depending on the complexity of the problem, your symptoms and the mechanisms that caused them. You will have a thorough case history taken which will not just be about your presenting complaint, but also about your past health history.

More...

Say Goodbye to Pain!

Chiropractic is a branch of health care based upon the belief that good health partially depends on a healthy spine and accompanying nervous system.

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- ✓ BACK PAIN
- ✓ WHIPLASH & NECK PAIN
- ✓ SPORTS INJURIES
- ✓ ARTHRITIC PAIN
- ✓ HEADACHES & MIGRAINES
- ✓ SHOULDER PAIN
- ✓ HIP, KNEE & ANKLE PAIN
- ✓ ELBOW PAIN
- ✓ WORK RELATED INJURIES
- ✓ PERSONAL INJURIES

Eric B. Fromer Chiropractic, Inc.
5123 West Sunset Blvd. Suite 202
Los Angeles, CA. 90027

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Services
FAQ
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(323) 962-6832
We accept the following credit cards:

ERIC B. FROMER
CHIROPRACTIC, INC.
Los Angeles Chiropractor

Contact Eric B. Fromer Chiropractic, Inc.

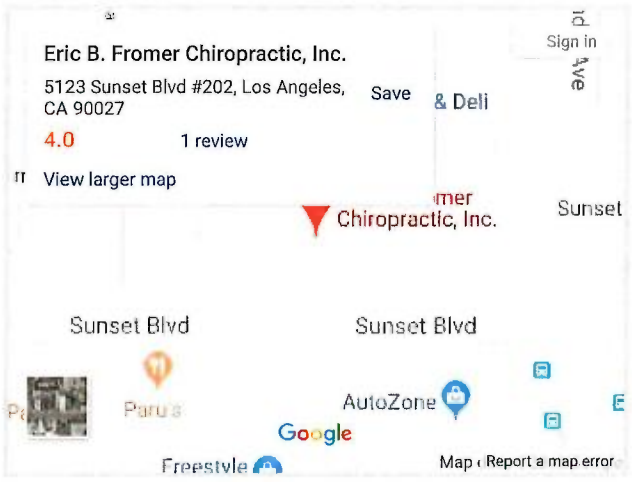
At Dr. Fromer's office, our first priority is personalized patient care, but we can't help you if we don't hear from you! Whatever your needs, be it emergency services to treat an unfortunate injury or regular appointments to help manage your pain, we look forward to helping you. Feel free to contact us with any questions, concerns or issues you might have. We always offer friendly customer service and we will return your call as quickly as possible.

Our standard business hours are 8AM - 6PM Monday - Friday. If you are contacting us after hours we will respond as promptly as possible. If you have a medical emergency, please leave us a message and call 911.

Our Business Hours:

Monday to Friday: 8AM - 6PM
Saturday and Sunday: Closed
We look forward to hearing from you.

Our Location



More Information

5123 West Sunset Blvd. Suite 202
Los Angeles, CA. 90027
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EXHIBIT 2

Anthem BlueCross

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Find a Doctor Results

See Important Notice Below about Participating Providers*

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Sort by: Distance

2 Doctor/Medical Professional within 20 miles of 90027 matching fromer

If you are contemplating care from Sutter Health, a Northern California-based health system, please contact your employer to confirm that Sutter is still in network. Providers affiliated with Sutter Health may or may not have "Sutter" in their name.

Please check if your doctor or hospital is in your plan's network before visiting them. This is especially important at the beginning of a new plan year.

EPO Individual & Family Plans in 2018

For 2018, we will offer Affordable Care Act (ACA) Individual & Family EPO plans only in the following counties: Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, Glenn, Humboldt, Lake, Lassen, Mariposa, Mendocino, Merced, Modoc, Nevada, Plumas, San Joaquin, Santa Clara, Shasta, Sierra, Siskiyou, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yuba.

PPO and HMO Individual & Family Plans in 2018

For 2018, we will not offer Affordable Care Act (ACA) Individual & Family HMO or PPO plans in California.

Refine Results

Distance
Within 20 miles of 90027

5 10 20 30 50 75 100

Specialty

Gender

Additional Options

Recognition/Awards

For more options:

Return to Search

1 - 2 of 2

CARE PROVIDER	LOCATION	QUALITY

ERIC FROMER DC

Anthem Preferred

GENDER: Male
SPECIALTY: Chiropractor

Compare

DISTANCE: 2.0 miles away
5123 W SUNSET BLVD STE 202,
LOS ANGELES, CA 90027 Los Angeles
Driving distance & directions
Telephone: 323.962.8520

ERIC B FROMER CHIROPRACTIC INC

SPECIALTY: Chiropractor

Compare

DISTANCE: 2.0 miles away
5123 W SUNSET BLVD STE 202,
LOS ANGELES, CA 90027 Los Angeles
Driving distance & directions
Telephone: 323.962.8520

1 - 2 of 2 **Page:** 1

IMPORTANT

While we make efforts to ensure that our lists of doctors and hospitals are up to date and accurate, providers do leave our networks from time to time, and these listings do change. There are hospitals, doctors or other providers who are not included in every plan network. **Please make sure you are searching the right network.** Logging in as a member is the most accurate method to search for providers in your plan network. You may also enter your Prefix (the first three values of your member number on your ID card). There may be higher costs to you if you visit a provider who is not in your plan network. We recommend you contact the provider to confirm that they are in your plan network and that the desired service is covered.

These networks serve Blue View Vision, Blue View Vision Select, Blue View Vision Insight and Anthem Vision members only. Vision coverage includes routine vision examinations, corrective eyewear and other discounts. Reference your plan documents for details. Please see your health plan directory for eye related medical or surgical treatment. Show More

Designation as a Blue Distinction Total Care Provider means this Provider has met the established national criteria. To find out which services are covered under your policy at any facilities, please call your local Blue Cross and/or Blue Shield Plan; and call your provider before making an appointment, to verify the most current information on its Network participation and Blue Distinction Total Care status. Neither Blue Cross and Blue Shield Association nor any of its Licensees are responsible for any damages, losses, or non-covered charges that may result from using Blue Distinction or receiving care from a Blue Distinction or other provider.

Additional information on standard waiting times are available in our Timely Access to Care brochure.

To receive benefits, some services must be reviewed to determine medical necessity. A request for service may be denied because it's not medically necessary at a certain level-of-care or at a certain facility. When this happens the service may be requested again using a different provider or facility. If you have any questions, please call the member services number on your member ID card.

Helpful Hints

- How do I make sure a doctor accepts my insurance plan?
- How do we choose doctors and hospitals for our networks?
- How do I compare doctors?
- Can I find these doctors on a map?
- How do I narrow my results?
- These doctors don't meet my needs. How do I change my information and search again?
- How do I view the next page of results?
- How do I print these results?
- How do I email my search results to myself or someone else?
- What is Blue Distinction?
- How do I start over?
- How do I learn more about a certain doctor?
- How often do you update this information?

EXHIBIT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Inovalon, Inc.'s Petition for Expedited Declaratory Ruling	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

PETITION FOR EXPEDITED DECLARATORY RULING CLARIFYING UNSOLICITED ADVERTISEMENT PROVISION OF TELEPHONE CONSUMER PROTECTION ACT AND JUNK FAX PREVENTION ACT

Inovalon, Inc.
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Chief Legal Officer
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Bowie, MD 20716
(301) 809-4000

Daniel S. Blynn
James Arden Barnett, Jr, Rear Admiral, USN (Ret.)
Ian D. Volner
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(202) 344-4000

Counsel to Inovalon, Inc.

February 19, 2018

EXECUTIVE SUMMARY

Inovalon, Inc. ("Inovalon") is a cloud-enabled technology company empowering the transformation to value-based healthcare. Having brought together a uniquely integrated platform comprised of extensive healthcare ecosystem connectivity, large-scale real-world clinical datasets, sophisticated analytics, and ultra high-speed compute architectures, Inovalon provides a highly flexible, native cloud-based Platform-as-a-Service capability to health plan, provider system, pharmaceutical, and device manufacturer adjacencies.

Inovalon is retained by health plans, on a regional and national level, to deliver solution platforms that drive an effective determination and substantiation of disease and comorbid condition data. Collecting patients' medical records from healthcare providers is one step in the broader solution platform process and Inovalon provides multiple submission method options for providers to provide requested medical records, including by electronic health record ("EHR") interconnectivity, remote connections/collaborative retrieval, fax, and onsite retrieval. Once Inovalon has collected the patients' records, they are scanned and digitized (if they are not already in such form), and the patient's electronic health record is utilized to close gaps in assessment, provider disease burden documentation, and care for Medicare, Medicaid, and commercial Affordable Care Act populations in a targeted and efficient manner. In order to collect patients' medical records efficiently and with minimal interruption to the health providers' business operations, Inovalon offers electronic health record interconnectivity.

A medical provider has a contract with the health plan on whose behalf Inovalon acts. Inovalon acts as the health plans' designee when it contacts the providers. Inovalon currently does not offer any commercially available EHR product or service to the providers who receive its faxes; rather, it simply offers free, "no cost" collection and digitization services paid for by

the health plans. The faxes are purely informational and serve to enhance patient care and the practice of medicine more generally. They are not actionable "unsolicited advertisements" under the Telephone Consumer Protection Act ("TCPA").

Despite this, Inovalon recently has found itself targeted in a Junk Fax Prevention Act class action arising out of a single fax it sent to a medical provider as part of its efforts to collect patient records. The plaintiff seeks at least $5 million in damages on behalf of a nationwide class of fax recipients. In broad and conclusory terms, the plaintiff incorrectly claims that Inovalon "profit[s] and benefit[s] from the sale of the products, goods and services advertised" in its faxes without explaining what makes the fax at issue an alleged advertisement in the first instance. The complaint seeks to impermissibly broaden the TCPA's definition of "advertisement" and exploit conflicting court decisions as to what constitutes an advertisement under the Act. The practical result is uncertainty among industry and the general public, substantial legal exposure and risk for any participant in the medical industry, and the chilling of important health-related communications.

Therefore, Inovalon respectfully requests an expedited declaratory ruling from the Commission that confirms that faxes sent by the designee of a health plan to a patient's medical provider, pursuant to an established business relationship between the health plan and provider, requesting patient medical records are not "unsolicited advertisements." Accordingly, the Commission should declare that:

1. Faxes sent by a health insurance plan's designee to a patient's medical provider, pursuant to an established business relationship between the health plan and provider, requesting patient medical records are not advertisements under the TCPA; and

2. Faxes that offer the free collection and/or digitization of patient medical records, and which do not offer any commercially available product or service to the recipients are not advertisements under the TCPA.

These requested rulings are consistent with the Commission's previous orders regarding what constitutes an advertisement under the TCPA and the legislative intent and purpose of the TCPA, and, moreover, promote beneficial patient health communications.

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Pursuant to Section 1.2 of the Rules of the Federal Communications Commission ("FCC" or "Commission"),[1] Inovalon, Inc. ("Inovalon") respectfully petitions the Commission for an expedited declaratory ruling clarifying that requests made by a health insurance plan's designee to a patient's doctor or other medical professional (who has provided his, her, or its telephone number to the health plan in the first instance) seeking the patient's medical records do not constitute "advertisements" under the Telephone Consumer Protection Act ("TCPA"), as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), especially where the requests represent that the medical provider can take advantage of "no cost" medical record digitization services to supply those records, and the health plan's designee offers no commercially available products or services to the provider. A declaratory ruling from the Commission is necessary to eliminate judicial confusion over what constitutes an actionable "unsolicited advertisement" under the JFPA, and to provide certainty and clarity to the industry and members of the public.

In addition, a declaratory ruling will help ebb the rising tide of professional litigants and plaintiffs' attorneys who target such types of informational communications to leverage the prospect of massive TCPA damages awards into multi-million dollar settlements of baseless class action litigation. These types of litigations chill important patient health communications – communications that the TCPA was never intended to cover in the first instance.

Accordingly, in order to provide clear guidance to the courts and the public, the FCC should declare that:

1. Where an established business relationship exists between a health insurance plan and a medical provider and the provider has given its facsimile number to the health plan, faxes sent by the health plan's designee to the provider seeking to collect patient health records are not "advertisements" under the TCPA; and

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[1] 47 C.F.R. § 1.2.

2. Faxes that offer free or "no cost" electronic health record collection, and which do not offer any commercially available product or service to the recipients, are not "advertisements" under the TCPA.

I. INTRODUCTION AND SUMMARY

The fax provision of the TCPA, as amended by the JFPA, generally prohibits "unsolicited advertisements" from being sent to U.S. fax machines unless: (a) the sender has an existing business relationship with the recipient, (b) the recipient provided his or her fax number voluntarily, and (c) the fax contains a notice with certain statutorily-prescribed contents.[2] The lack of clarity surrounding what constitutes an "advertisement" has facilitated a rise in abusive litigation that has distorted the TCPA beyond recognition and discourages legitimate businesses from engaging in lawful communications. Inovalon itself is facing such a lawsuit, and wishes to obtain a definitive ruling from the Commission that Inovalon's practice of sending faxes to recipients that have contractually agreed to receive them (and for which Inovalon is merely acting as a middle-man) is not unlawful. Further, Inovalon seeks a declaratory ruling that its faxes to medical service providers, which offer "no cost" electronic health record extraction services are not "advertisements" under the JFPA – this being especially true given that Inovalon offers no commercially available product or service to the recipients of such faxes. Inovalon also submits that such declaratory rulings will help curtail the rising tide of abusive litigation and save other would-be defendants from similar time and expense while simultaneously providing clear rules that will maintain lawful and important communications.[3]

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[2] 47 U.S.C. § 227(b)(1)(C).

[3] Inovalon seeks a declaration that somewhat overlaps with that sought by M3 USA Corporation in its March 20, 2017 Petition for Expedited Declaratory Ruling (*available at* https://ecfsapi.fcc.gov/file/10321896504076/M3%20Petition%20for%20Declaratory%20Ruling.pdf) (hereinafter "M3 USA Petition"). Although M3 USA's petition seeks a ruling that double-blind informational surveys are not property, goods, or services, and that fax invitations to complete such surveys are not "advertisements" for TCPA

II. BACKGROUND ON PETITIONER

A. Inovalon's Services and Business Model

Inovalon contracts with health plans, provider systems, pharmaceutical, and device manufacturer adjacencies to collect and analyze patient health data. Medical providers, through their contracts with the insurance companies, consent to provide patient medical information to insurers; they provide their contact information, including facsimile numbers, to the insurers. The respective insurance companies, in turn, provide data to Inovalon that contains provider information, and Inovalon, then, contacts the providers, as a designee of each respective insurance company, to verify the provider's site address and contact information, including fax number, and to retrieve patients' health records. Depending on the provider and the records to be retrieved, Inovalon informs the providers how the records may be collected; for example, Inovalon can come to the provider's office to create a digital image of the medical record. The most efficient way to collect the necessary data from providers is by using electronic health records ("EHRs"). EHRs are a digital version of a patient's paper chart; they are real-time, patient-centered records that make information available instantly and securely to authorized users. Through the use of Inovalon's EHR Interoperability solution, Inovalon can collect patient data from providers through a HIPAA-compliant connectivity gateway process without having to be physically present in their offices, minimizing disruption to the providers and their patients with the simultaneous goal of minimizing health care costs.

Medical providers who do not respond to initial requests may receive a fax from Inovalon, promoting the use of Inovalon's EHR Interoperability solution as a way for providers to comply with their obligations to transmit patient records in an efficient, cost-effective manner.

---

purposes, the overarching request of both petitions is similar – clarity regarding the meaning of "advertisement" so as to curtail abusive TCPA litigation. For that reason, Inovalon incorporates by reference sections I.B.1, II.A, II.B, II.C and II.D.3 of the M3 USA Petition.

Inovalon receives no money or sales from the providers' use of the EHR Interoperability solution. The EHR system is merely one way for providers to supply patient information to Inovalon, as required by their contracts with the insurance companies. The providers contractually consent to be contacted by health plans to obtain patient health records, and the health plans delegate this function to Inovalon. Inovalon receives no compensation from providers for using EHR, nor does it currently market its EHR Interoperability solution to providers.

B. Pending TCPA/JFPA Litigation Against Inovalon

On December 26, 2017, Plaintiff Eric B. Fromer Chiropractic, Inc. ("Fromer") filed a putative class action against Inovalon and its corporate affiliates in the U.S. District Court for the District of Maryland, alleging that a single fax received on November 14, 2017 constituted an unsolicited advertisement in violation of the JFPA.[4] From that single fax, Fromer seeks to represent a class of persons who received faxes from Inovalon, "whether sent to Plaintiff or not,"[5] and seeks at least $5 million in statutory damages under the TCPA. Rather than pleading a plausible explanation as to how Inovalon's fax constitutes an "advertisement," the Complaint alleges a rote recitation of the TCPA's statutory language.[6] Fromer's reasons for omitting this crucial allegation are two-fold.

First, Fromer is a frequent JFPA plaintiff. Fromer's suit against Inovalon is its fifth TCPA/JFPA suit filed in federal court over the past three years.[7] Its complaints have a notable

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4 *Eric B. Fromer Chiropractic, Inc. v. Inovalon Holdings, Inc., et al.*, No. 8:17-cv-03801-GJH, Compl. (D. Md. Dec. 26, 2017) (Dkt. 1) (hereinafter, "Complaint").

5 Compl. at ¶ 4.

6 Compl. at ¶ 2 ("The Fax describes the commercial availability or quality of Defendants' products, goods and Services.").

7 *Eric B. Fromer Chiropractic, Inc. v. Lordex, Inc., et al.*, No. 2:14-cv-07771-AB-MAN, Compl. (C.D. Cal. Oct. 7, 2014) (Dkt. 1); *Eric B. Fromer Chiropractic, Inc. v. Spendwell Health, Inc., et al.*, No. 2:14-cv-08728,

assembly-line, cut-and-paste quality, and all allege receipt of one or two faxes. Each unsolicited fax Fromer receives that facially lacks the opt-out language required for an *advertisement* appears to trigger a knee-jerk reaction that sends Fromer running to court, without much thought for the specific context of the particular communication. Indeed, that is particularly true with respect to its case against Inovalon where, during a recorded September 7, 2017 telephone conversation between Inovalon and Fromer during which Inovalon confirmed contact information and hours of operation for Fromer's site, Fromer voluntarily provided its fax number to Inovalon as a "good fax number for [its] location." Second, Fromer loses on the merits were it to actually allege the true character of the fax – a transactional message in the context of an ongoing contractual relationship between medical providers and health plans. Even if the November 14, 2017 fax fell outside the TCPA's established business relationship exception, it still would not expose Inovalon to liability because it is not an "advertisement"; indeed, it advertised nothing to Fromer and had no commercial purpose.

Inovalon intends to raise these and additional arguments in defending itself against Fromer's allegations. Nevertheless, Inovalon petitions the Commission to clarify the meaning of an "advertisement" under the TCPA and JFPA in order to resolve conflicting decisions in the courts, and to help curb this breed of abusive TCPA litigation in the future.

Compl. (C.D. Cal. Nov. 10, 2014) (Dkt. 1); *Eric B. Fromer Chiropractic, Inc. v. N.Y. Life Ins. & Annuity Corp., et al.*, No. 2:15-cv-4767, Compl. (C.D. Cal. June 24, 2015) (Dkt. 1); *Eric B. Fromer Chiropractic, Inc. v. Molina Healthcare of Cal., et al.*, No. 2:15-cv-6403, Compl. (C.D. Cal. Aug. 21, 2015) (Dkt. 1) (alleging receipt of five faxes). These four suits have ended in three voluntary dismissals – likely stemming from individual settlements – and one class settlement with a common fund of $1.1 million. Fromer's counsel sought an award of $319,000 of that total and Fromer requested $15,000 as an incentive payment for simply lending its name to the complaint. *See N.Y. Life Ins. & Annuity Corp.*, Order Re: Pl.'s Mot. for Final Approval of Class Action Settlement and Mot. for Award of Attorneys' Fees (Dkt. 83).

III. STATUTORY LANGUAGE AND FCC GUIDANCE

A. The Prohibition on Unsolicited Advertisements

47 U.S.C. § 227(b)(1)(C) makes it "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to send, to a telephone facsimile machine, an unsolicited advertisement, unless" (1) the sender has an established business relationship with the recipient, (2) the sender obtained the recipient's fax number in certain ways, and (3) the message contains certain statutorily prescribed opt-out language.[8]

B. Transactional Messages Are Not Advertisements

The TCPA regulates "unsolicited advertisement[s]," defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."[9] The FCC has explained that "unsolicited advertisements" do not include "transactional" communications, which are "messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender . . ."[10] After examining a number of examples of these transactional messages that fall outside the definition of an "unsolicited advertisement,"[11] the FCC distilled the common thread among

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[8] It bears noting that, last year in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), the D.C. Circuit held that solicited facsimile advertisements do not need to contain opt-out notices.

[9] 47 U.S.C. § 227(a)(5); *accord* 47 C.F.R. § 64.1200(f)(1) (defining advertisement as "any material advertising the commercial availability or quality of any property, goods, or services").

[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd 2787, 3812-12, ¶ 49 (2006) ("Junk Fax Order").

[11] These examples include "a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, . . . messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, subscription, membership, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender's product or service, . . . c]ommunications sent to facilitate a loan transaction,

them: exempted messages "must relate specifically to existing accounts and ongoing transactions."[12] By contrast, "[m]essages regarding new or additional business would advertise 'the commercial availability or quality of any property, goods, or services . . .' and therefore would be covered by the prohibition."[13]

In determining whether a particular communication is an advertisement, the FCC looks to its "primary purpose."[14] Incidental or *de minimis* advertising, such as the inclusion of a sender's logo or business slogan, does not convert an otherwise transactional communication to an advertisement by virtue of those elements.[15] Mere "reference to a commercial entity does not by itself make a message a commercial message."[16]

C. Informational Messages Are Not Advertisements Unless They Are Pretextual

Part of the "primary purpose" analysis involves evaluating whether the purportedly transactional communication is actually mere pretext for an advertisement. According to the FCC, "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements" because they (1) are mere pretext, or (2) form part of an overall marketing campaign.[17] By

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such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate) and other similar documents . . . when their purpose is to complete the financial transaction[,] . . . [a] travel itinerary for a trip a customer has agreed to take or is in the process of negotiating[,] . . . a contract to be signed and returned by the agent or traveler that is for the purpose of closing a travel deal[,] . . . [a] communication from a trade show organizer to an exhibitor regarding the show and her appearance ..., provided the exhibitor has already agreed to appear[,] . . . a mortgage rate sheet sent to a broker or other intermediary or a price list sent from a wholesaler to a distributor (e.g., food wholesaler to a grocery store) for the purpose of communicating the terms on which a transaction has already occurred[,] . . . [a] subscription renewal notice . . ., provided the recipient is a current subscriber and had affirmatively subscribed to the publication[,] [and] a notice soliciting bid proposals on a construction project . . ., provided the notice does not otherwise contain offers for products, goods, and services." Junk Fax Order at ¶ 49.

12 Junk Fax Order at ¶ 50.

13 Junk Fax Order at ¶ 50.

14 Junk Fax Order at ¶ 51.

15 Junk Fax Order at ¶¶ 51-52.

16 Junk Fax Order at ¶ 51.

17 Junk Fax Order at ¶ 52.

contrast, purely informational communications, or those whose primary purpose is to communicate information (even in the presence of incidental advertising) are not considered advertisements.[18] This includes "industry news articles, legislative updates, or employee benefit information," and informational newsletters.[19]

IV. ARGUMENT

A. The FCC is Authorized to Issue a Declaratory Ruling Providing Additional Clarification on the Meaning of an "Advertisement"

The FCC is the agency entrusted by Congress as the expert on the TCPA,[20] and is empowered to use its "sound discretion [to] issue a declaratory order to terminate a controversy or remove uncertainty."[21]

B. A Declaratory Ruling is Needed to Resolve Conflicting Decisions in the Courts, Provide Clarity to the Public, and Curtail Abusive TCPA Litigation

Companies not only take their cues from statutory and regulatory language and FCC Guidance, but increasingly chill their behavior for fear of attracting the attention of aggressive plaintiffs' lawyers and risking millions of dollars in liability in specious, manufactured TCPA lawsuits. In a similar petition seeking a declaration that informational surveys are not advertisements for TCPA purposes, M3 USA Corporation succinctly summarized the problem.

> The uncertainty as to what is and is not a fax advertisement has harmed, and continues to harm, legitimate businesses carrying out legitimate and lawful business plans. . . . It has chilled legitimate and beneficial communications and has allowed plaintiffs' lawyers to hold companies hostage – oftentimes for millions of dollars – simply by virtue of the *in terrorem* effect of putative TCPA class actions in which class members are entitled to statutory damages of $500 or $1,500 *per violation*, even in the absence of actual harm. . . . [G]iven the enormous exposure created by the TCPA, the professional plaintiffs' bar and the

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18 Junk Fax Order at ¶ 53.

19 Junk Fax Order at ¶ 53.

20 *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, et al.*, Order, 31 FCC Rcd 11943, 11949 ¶ 12 (Cons. & Gov't Affairs Bur. 2016).

21 5 U.S.C. § 554(e).

> uncertainty surrounding the definition of "advertisement," multi-million dollar settlements have become a distressingly routine means for legitimate businesses to mitigate the risk and exposure of abusive class actions under the TCPA.[22]

A simple review of recent decisions examining the meaning of "advertisement" in TCPA cases reflects confusion among the lower courts, and professional plaintiffs' ability to exploit that lack of clarity. *Compare Physician's Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d. Cir. 2017) (applying a presumption of profit motive at the motion to dismiss stage, holding a fax invitation to physicians to attend to a free dinner discussion of a medical condition hosted by a pharmaceutical company constituted an advertisement because "[b]usinesses are always eager to promote their wares and usually do not fund presentations for no business purpose," and requiring defendant to proceed to discovery to rebut the presumption that it did not intend to promote its products, despite uncontroverted evidence that defendant had no product to treat medical condition at that time and was forbidden by FDA regulations from promoting drugs pending approval); *Arkin v. Innocutis Holdings, LLC*, 188 F. Supp. 3d 1304 (M.D. Fla. 2016) (holding that an otherwise informational fax constituted an advertisement because the information was about a product); *Orrington v. Scion Dental, Inc.*, No. 17-CV-00884, 2017 WL 5569741 (N.D. Ill. Nov. 20, 2017) (refusing to find that faxed webinar invitations were not advertisements as a matter of law, where plaintiff alleged that defendant's business model depended on signing up dentists to expand its network, and the free webinars were intended to introduce defendant's software to dentists and enroll them in defendant's platform, and thus were commercial in nature); *Drug Reform Coordination Network, Inc. v. Grey House Pub., Inc.*, 106 F. Supp. 3d 9 (D.D.C. 2015) (finding a fax offering the recipient a free listing in a forthcoming directory, which was not an unsolicited advertisement

[22] *In re M3 USA Corp.'s Petition for Expedited Declaratory Ruling*, CG Dkt. No. 02-278, Pet. for Expedited Declaratory Ruling, at 14-16 (FCC Mar. 20, 2017).

"on its face," was nonetheless unlawful when viewed in the context of later-received emails offering the directory for sale); *with Sandusky Wellness Ctr., LLC v. Medco Health Solutions., Inc.*, 788 F.3d 218, 223 (6th Cir. 2015) (concluding that faxed updates to a prescription drug formulary, advising physicians of generics and other drugs covered under a health plan, were not advertisements because they did not purport to sell anything, but merely to inform physicians of cheaper drug options for patients); *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-14887 (S.D.W.V. Sept. 30, 2016) (agreeing that a fax offering a free Physician's Desk Reference eBook was not an advertisement because there was no "commercial aim" where the sender neither sold the book nor the prescription drugs described in the book); *N.B. Indus., Inc. v. Wells Fargo & Co.*, 465 Fed. App'x. 640, 642 (9th Cir. 2012) (holding that for a fax to be an advertisement, it must promote something that is "commercially available").

Fromer's complaint is the quintessential "poster child for [TCPA] lawsuit abuse" targeting "legitimate, domestic businesses" that Chairman Pai observed when the TCPA was amended in July 2015.[23] Inovalon is presented with a Catch 22: either spend years potentially litigating – at great financial cost and business interruption – to prevail on the merits, or try to resolve the litigation through what surely will be an expensive class settlement. The only ones who benefit from the litigation are Fromer's counsel and, potentially, Fromer himself if he seeks $15,000 as an incentive award through a settlement as he sought in other recent JFPA litigation.[24] On the other hand, "legitimate, domestic businesses," such as Inovalon suffer, patients whose medical records will not be collected suffer, and important medical communications are chilled by the potential of similarly spurious lawsuits. Thus, the

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[23] *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8072-73, (2015) (Pai, dissenting).

[24] *See, supra*, n.7.

Commission's interpretation of "advertisement" is paramount.

V. CONCLUSION

For the reasons expressed above, Inovalon respectfully asks that the Commission issue a declaratory ruling holding that:

1. Where an established business relationship exists between a health plan company and a medical provider and the provider has given its facsimile number to the health plan, faxes sent by the designees of the health plan to the provider seeking to collect patient health records are not "advertisements" under the TCPA; and
2. Faxes that offer free or "no cost" electronic health record collection, and which do not offer any commercially available product or service to the recipients, are not "advertisements" under the TCPA.

Respectfully Submitted,

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